Petition

81-883

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

MAURICE JONES

Petitioner,

v.

STATE OF MARYLAND

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner's Motion to Suppress Evidence secured by means of the Search and Seizure Warrant issued in this case was improperly denied when the evidence and the documents themselves both demonstrated that the Search Warrant had been issued before the application for the Search Warrant had been supplied to the issuing judge.

Pursuant to Supreme Court Rule 21 the Petitioner herein raises the following subsidiary question fairly included within the original question, whether the Petitioner was denied his Sixth Amendment right to cross examine his accusers when the appellate court took judicial notice of testimony in a companion case.

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REFERENCE TO THE OPINION BELOW

The opinion below styled *In The Court of Special Appeals of Maryland*, No. 788, September Term, 1980, *Maurice Jones v. State of Maryland*, (June 23, 1981) was unreported (App. A). A petition for certiorari was filed in the Court of Appeals of Maryland and was styled *In The Court Of Appeals Of Maryland*, Petition Docket No. 334, September Term, 1981, *Maurice Jones v. State of Maryland*. The Petition for Certiorari was denied by the Court of Appeals of Maryland on September 9, 1981, (App. B).

JURISDICTION OF THIS COURT

The Petition for Writ of Certiorari was denied by the Court of Appeals of Maryland on September 9, 1981. The time within which to file a petition for a Writ of Certiorari in this Court extends to and including November 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and further pursuant to Supreme Court Rule 17(c).

CONSTITUTIONAL PROVISIONS INVOLVED

A. Amendment Four, United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the person or thing to be seized.

B. Amendment Six, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES INVOLVED

Annotated Code of Maryland, Article 27 §551(a), (Vol. 3A, Repl. Vol. 1980 Cum. Supp.)

Whenever it be made to appear to any judge of the Supreme Bench of Baltimore City, or to any judge of any of the Circuit Courts in the Counties of this State, or to any judge of the District Court, *by written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits* concerning facts within the personal knowledge of the affiant or affiants, that there is probable cause, the basis of which shall be set forth in the affidavit or affidavits, to believe that any misdemeanor or felony is being committed by an individual or in any building, apartment, premises, place or thing, within the territorial jurisdiction of such judge or that any property subject to seizure under the criminal laws of the state is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then the judge may forthwith issue a search warrant directed to any duly constituted policeman, or police officer. . . .

(Emphasis Supplied)

STATEMENT OF THE CASE

A search and seizure warrant dated October 16, 1979, was issued that date authorizing the Salisbury City Police Department to search the residence of 306 Buena Vista Avenue, Salisbury, Maryland. The application for this search warrant was not sworn to until October 17, 1979. The search warrant was executed on October 18, 1979, and as a result of the execution of the search warrant various drugs and other items were recovered from 306 Buena Vista

Avenue, Salisbury, Maryland. The Petitioner, Maurice Jones, was on the premises at the time the search warrant was executed and was arrested and charged with several drug violations as a result of the search and seizure.

Thereafter on February 4, 1980, a hearing was held on the Petitioner's Motion to Suppress the evidence secured by the search warrant. At that time the trial court ruled as follows:

> "The Court: Now, Gentlemen, to cross the first bridge first, the question has been raised as to the dates on the application and the search warrant itself, the search warrant having been dated the 17th of October 1979, and the application having been dated the 16th of October, 1979" SEE FOOTNOTE 1
>
> "The Court finds that on the basis of *Bell versus State*, 200 Md., wherein it said that the lack of a date does not invalidate a search warrant, then we think it would follow that an obvious clerical mistake made in the entry of the dates is not fatal and is a matter of form." (Suppression Tr. p. 35)."

The Petitioner thereafter was tried by a jury and convicted as a result of the introduction and use of the evidence secured by the search and seizure warrant executed on October 18, 1979.

At the time that the Petitioner was arrested, a co-defendant, Robert Adam Neverdon, was on the premises of 306 Buena Vista Avenue, Salisbury, Maryland and was also arrested and charged with several drug violations. The co-defendant Neverdon also filed the identical Motion to Suppress, which was heard by the same trial judge at the same time as the Petitioners' and denied on the dates issue

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[1]This was an inadvertant recollection by the Court, the search warrant was dated October 16, 1979, and the application for the warrant was dated October 17, 1979.

for the same reason. The co-defendant Neverdon was subsequently convicted at a court trial in the Circuit Court for Wicomico County, and his case was appealed to the Court of Special Appeals of Maryland and the propriety of the ruling on the search and seizure warrant was an issue on appeal. On November 28, 1980, in an unreported per curiam opinion, *Robert Adam Neverdon v. State of Maryland*, No. 441, September Term, 1980, (App. C.), was reversed and remanded for a new trial. The Neverdon case was reversed solely because the record disclosed that the search warrant was issued a day before the submission of the supporting affidavit. The Court of Special Appeals stated in its opinion as follows:

> "The problem on the record before us is not a question of an undated warrant but a warrant which on its face clearly says it was issued a day before the submission of the supporting affidavit. Judge Truitt was probably correct in his assessment that the date on the warrant and the date on the affidavit were a result of a "clerical mistake". On the other hand we find nothing in the record to support his concusion that it was "an obvious clerical mistake". The issue is much too crucial to the fair trial rights of the appellant to bottom such a conclusion on speculation, conjecture and probability.
>
> Accordingly we are compelled to reverse the judgments of conviction and do not reach the remaining issues raised by the appeallant." (App. C).

The Petitioner's case upon conviction was timely appealed to the Court of Special Appeals of Maryland where he also raised the issue of the correctness of the trial court's ruling upon the Motion to Suppress.

On June 23, 1981, in *The Court of Special Appeals of Maryland No. 788, September Term, 1980, Maurice Jones v. State of Maryland* (App. A) the Court in a unreported

opinion affirmed the judgment of the trial court. In doing so the appellate court took judicial notice of testimony in a companion case again in an unreported opinion of The Court of Special Appeals of Maryland, *Robert A. Neverdon v. State of Maryland*, No. 117, Sept. Term, 1981. Accordingly, in *Maurice Jones v. State of Maryland*, supra, the Court of Special Appeals stated in a footnote number 1 as follows:

> "We judicially notice that in Neverdon v. State, No. 117, Sept. Term, 1981, a companion case involving the identical warrant here discussed, the issuing judge testified that although he had no specific recollection of the warrant in question, he would not under any circumstances issue a search warrant without having first read the application. Detective Coulbourn M. Dykes testified that the application and the proposed search warrant were presented to the judge at the same time."

REASONS FOR GRANTING THE PETITION

The uncontroverted evidence in this case clearly demonstrated that the Search Warrant was dated October 16, 1979, and the Sworn Application was dated October 17, 1979. The dates in question were uncontested by the Respondent. Article 27 §551 of the Annotated Code of Maryland (1976 Repl. Vol., 1980 Cumm. Supp.) provides in part as follows:

> "Whenever it be made to appear to any judge of the Supreme Branch or to any judge of the Circuit Courts in the counties of this State, or to any judge of the District Court, by written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants, that there is probable cause, the basis

> of which shall be set forth in said affidavit or affidavits to believe that any misdemeanor or felony is being committed by an individual . . .then the judge may forthwith issue a search warrant. . . ."

The clear import of Article 27 §551 is that a search warrant may issue only when accompanied by a written application signed and sworn to by the applicant containing facts within the personal knowledge of the affiant which establish a basis for probable cause. (emphasis supplied)

The procedures outlined in Article 27 §551 are substantive in nature and reflect the constitutional protections afforded to the accused by the Fourth Amendment to the United States Constitution. The Fourth Amendment to the Federal Constitution provides that No Warrants shall issue, but upon probable cause, supported by oath or affirmation.

The foregoing provisions make it clear beyond any doubt that a search warrant may be issued only when accompanied by a sworn affidavit establishing the basis for its issuance.

This was the conclusion reached by the Court of Special Appeals in deciding *Robert Adam Neverdon v. State of Maryland* September Term, 1980, No. 441 (App. C) wherein the Court stated at page 1 of the opinion.

> ". . .Thus, it is crystal clear that no search warrant may be issued except upon the basis of a sworn affidavit submitted to the judge prior to his issuance of the warrant. Here it is uncontroverted that the search warrant on its face demonstrates that the date of issuance was one day before the supporting affidavit was submitted to the issuing judge."

Nevertheless, subsequent to that decision the Court of Special Appeals in deciding precisely the same questions of the dates in this case held, that more evidence that the *mere dating of documents* was necessary to show that the issuing

Judge violated the fundamental requirement that an application under oath be presented *before* the issuing Judge issues a Search Warrant. The Court of Special Appeals herein held that the date of the Application was merely a clerical error (App. A). No evidentiary hearing had been held in this case. If it was a clerical error due to process of law would require an existing record for the Appellate Court's review. None existed. The appellate court in an effort to escape this dilemma simply took judicial notice of testimony in a later hearing in a companion case then before the Court of Special Appeals, *Neverdon v. State, No. 117, September Term, 1981*, wherein the Court stated in a footnote:

> "We judicially notice that the Neverdon v. State, No. 117, Sept. Term, 1981, a companion case involving the identical warrant here discussed, the issuing judge testified that although he had no specific recollection of the warrant in question, he would not under any circumstance issue a search warrant without having first read the application. Detective Coulbourn M. Dykes testified that the application and the proposed search warrant were presented to the judge at the same time."

To allow this raises two fairly included questions with regard to the Sixth Amendment to the United States Constitution and with the so called Four Corners Doctrine.

The Sixth Amendment to the United States Constitution states in part:

> "In all criminal prosecutions the accused shall enjoy the right . . .to be confronted with the witnesses against him. . ."

Without an evidentiary hearing, the Court had no record. Without a record the Defendant was not afforded his most fundamental right of cross examination of the witness (i.e. the issuing Judge in *Neverdon v. State*, supra). The testi-

mony of the issuing Judge was clearly adversary. It is basic to our system of criminal justice that a criminal defendant be afforded the opportunity to confront his accusers. The Court of Special Appeals had no way of knowing what the product of such a hearing might be as none was held.

Courts may judicially notice notorious and uncontroverted facts which are known by common knowledge and observation but the question of the dates was obviously contested and subject to great dispute. The Petitioner should have been granted the opportunity to be heard on this testimony, and an opportunity to cross-examine, refute and confront these witnesses. As the Court of Special Appeals said in *Neverdon v. State*, September Term, 1980, No. 441 at page 3 (App. C)

> "...The issue is much too crucial to the fair trial rights of the Appellant to bottom such a conclusion on speculation, conjecture and probability.
>
> Accordingly, we are compelled to reverse the judgments of conviction. . ."

The actions of the Court of Special Appeals in attempting to cure the inconsistent dates by holding them to be merely clerical errors and by taking judicial notice of testimony in a companion case raises the troublesome question of whether an evidentiary hearing could have been held at all in this case or the companion case.

In contesting the sufficiency of an affidavit in support of a search warrant the accused has been long restricted to the "four corners" of the affidavit. To allow The Court of Special Appeals to take judicial notice of testimony in a companion case is to allow the prosecution in a criminal case to go beyond the "four corners". This Court has permitted the accused to go beyond the "four corners" to contest the sufficiency of the affidavit on which a search warrant was

based only after a preliminary showing under oath that an agent or representative of the State has:

(1) intentionally made false or untrue statements or otherwise practiced fraud on the magistrate; or

(2) that a material statement made by such agent or representative is false, whether intentional or not.

Franks v. Delaware, 438 U.S. 154, 57 L.Ed. 667, 98 S.Ct. 2674 (1978)

The restrictions applied to the criminally accused in going beyond the "four corners" have been extremely restrictive. It has been only in the most stringent of circumstances that the exception has been granted. *Franks v. Delaware*, supra. The same type of equally stringent rule should apply to the prosecution. To allow The Court of Special Appeals to judicially notice testimony clearly beyond the four corners is to allow that court to improperly cure a fundamental defect in the record in violation of the due process protections afforded a criminal defendant. The fact of the matter is that The Court of Special Appeals had *no record* before them supporting this holding.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

Court of Special Appeals of Maryland

No. 788

September Term, 1980

MAURICE JONES

v.

STATE OF MARYLAND

Thompson
Wilner
Couch,

JJ.

PER CURIAM

Filed: June 23, 1981

PER CURIAM

Maurice Jones, the appellant, was convicted in the Circuit Court for Wicomico County, Alfred T. Truitt, Jr., Judge, of possession of controlled paraphernalia (two counts), possession of marihuana and possession of cocaine. He was sentenced to various terms totalling seven years' confinement and fined $5,000. On appeal he raises a number of contentions which we will group under four headings: I Sufficiency of the Evidence; II Search Warrant; III Discovery; and IV Motion for Mistrial.

I. Sufficiency of the Evidence

At the time the search warrant was executed the appellant was found undressed in bed in a second story bedroom. The following items were seized from the bedroom:

1. Three (3) small brown bottles on top of the dresser containing suspected controlled dangerous substance residue later laboratory tested as cocaine residue.

2. A plastic bag containing marihuana setting in a bowl on a shelf in the room.

3. A syringe removed from the top of the dresser.

4. One (1) plastic bag containing marihuana on top of the bureau behind a picture.

In addition, other items not in plain view were found as follows:

5. Plastic bag with white powder residue and a piece of white and blue plastic straw in a blue coat hanging on a bedpost of the bed on which appellant was lying.

6. One (1) brown envelope containing suspected marihuana and marihuana seeds in a drawer.

7. One hundred ninety-seven (197) small brown envelopes in top right drawer.

8. Eight (8) syringes in a plastic bag in second drawer of dresser.

9. Five (5) bags each containing ten (10) needles each (10 complete syringes in each bag) in bottom drawer of dresser.

10. Three hundred twenty-four (324) small plastic bags and a silver spoon in closet.

11. A Daisy Seal-A-Meal beside bureau.

12. A Sears Seal-A-Meal behind bed.

The appellant, relying on *Garrison v. State*, 272 Md. 123, 127, 321 A.2d 767 (1974), contends that this evidence was not sufficient to support the convictions. In that case the Court said:

> "No contraband was discovered in a search of the bedroom in which the appellant was found, but in the drawer of a combination dresser-wardrobe there was found $168 in currency, $85.18 rolled in coin wrappers, a rent card in the name of the appellant showing a tenancy beginning February 29, 1972—with the rent paid through May 16th, and a 'turn-off notice' addressed to 'Miss Shirley Annette Garrison, 1525 Leslie Street' from the Baltimore Gas and Electric Company concerning an unpaid utility bill in the amount of $22.82.
>
> "After the appellant and her husband were arrested an inspection of their arms indicated the presence of needle marks estimated to have been from ten days to two weeks in age. The officers next searched the 1969 Oldsmobile parked outside the premises—with negative results—and proceeded to serve the warrant at 1553 Leslie Street. No substantive evidence was offered to connect the appellant with 1553 Leslie Street, nor to identify her as an occupant of the Oldsmobile when the second 'controlled purchase' was made." (footnote omitted).

We are unable to see any similarity in that case and the instantcase. Here, there was substantial contraband found in the very bedroom in which the appellant was located at the time the warrant was served. Male cothing was found in the closet, chest and bureau.

II. The Search Warrant

Appellant makes two arguments that the search warrant is invalid. The first was on the basis that the warrant was dated one day earlier than the application. The second was on the basis that the application did not show either the reliability or the basis of knowledge of the four unnamed informants as required by *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

The search warrant was dated October 16, 1979 and the application was dated October 17, 1979. The appellant contends that that is conclusive evidence that there was no application attached to the warrant at the time it was issued as required by Md. Ann. Code Art. 27 §551, Article 26 of the Maryland Declaration of Rights and the Fourth Amendment to the Constitution of the United States. We disagree. It take more evidence than the mere dating of documents to show that the issuing judge violated the fundamental requirement that an application under oath be presented before he issues a search warrant. The warrant as issued recited that it was issued after "Affidavit having been made before me, the undersigned Judge of the Circuit Court for Wicomico County" and after "having examined the aforesaid Application and the Affidavots attached thereto as part thereof. . . ." We think those recitals together with the presumption of the

issuing judge's knowledge of the law are quite sufficient to support the trial judge's holding that the date of the application was merely a clerical error.[1]

The argument that the *Aguilar v. Texas*, *supra*, and *Spinelli v. United States*, *supra*, requirements are not satisfied with respect to any of the informants will be disposed of with dispatch. It would appear that the controlled buy and the observations of the police officers recited in the application would be sufficient in themselves to make the warrant valid even though none of the informants met the *Aguilar-Spinelli* test. We will, however, review a portion of the warrant with respect to Informant No. 1 and, as one informant alone is sufficient we need not examine the reliability or the basis of knowledge of the other three informants. With reference to Informant No. 1, the application recited:

> "Informant #1 has been known by me for approximately nine years. Informant #1 has supplied information that cleared one felony case which this division had no leads in and the suspect was arrested as a result of the information supplied by Informant #1. The suspect was later convicted and sentenced to over ten years.
>
> "Informant #1 has supplied information that led to clearing another felony case and the recovery of stolen property. The suspect in this case was arrested as a result of the information supplied by Informant #1.

---

[1]We judicially notice that in Neverdon v. State, No. 117, Sept. Term, 1981, a companion case involving the identical warrant here discussed, the issuing judge testified that although he had no specific recollection of the warrant in question, he would not under any circumstance issue a search warrant without having first read the application. Detective Coulbourn M. Dykes testified that the application and the proposed search warrant were presented to the judge at the same time.

> "On 09/28/79 I contacted Informant #1 and #1 stated to me that #1 could purchase heroin from Nev at Nev's House on Buena Vista Avenue. Informant #1 stated that Nev had a large and steady supply of heroin, cocaine and some Dailaudid (referred to as Smack, Coke and D's). #1 stated that a dude going by the name of 'Hardhead' was running the supply to Nev from Washington, D.C. Informant #1 stated that Hardhead had a silver Ford LTD with DC tags. Informant #1 stated that Fuzzy (Nora) Barkley was living with Nev and is dealing for Nev and Hardhead. Also that Nev's 'old lady' is staying there and her name is Vonda. Informant #1 states that Greg Banks is also dealing for Nev and Hardhead. Informant #1 states that #1 has purchased heroin from Nev (at Nev's house on Buena Vista Avenue) on several occasions."

This is obviously sufficient to show that he was a reliable informant and had a basis of knowledge sufficient to support an inference that illicit drugs were being sold at the premises described in the warrant. *See, State v. Kraft*, 269 Md. 583, 307 A.2d 683 (1973), *cert. denied*, 416 U.S. 994 (1974); *Stanley v. State*, 19 md. App. 507, 313 A.2d 847, *cert. denied*, 271 Md. 745 (1974).

III. Discovery

(a) Appellant first contends that his right to discovery under Md. Rule 741(a) was violated when the State did not disclose to him prior to trial the material which it received in a controlled buy by Informant No.4. It should be noted that this rule pertains only to materials acquired as a result of a search or seizure. We are not aware of any authority which holds that materials purchased in a controlled buy are obtained as a result of either a search or a seizure. The materials were voluntarily given the informant by some

guilty party and thus were obtained by neither a search nor a seizure.

Appellant also contends that his objection to testimony concerning money seized during the search which was not disclosed, as required by Md. Rule 741(a), should have been sustained. This seizure was required to be reported in the inventory and no further disclosure under Md. Rule 741(a) is required.

(b) Appellant alleges the trial judge erred in denying his motions to require the State to furnish the names of the informants because (1) he did not know whether illegal sources of information were used as the basis of probable cause and 92) because he may have been able to show that there was a deliberate falsehood or a reckless disregard of the truth in the application for the warrant. In making the argument, the appellant overlooks the requirement that he must first make a showing that he has substantial evidence to support such allegations. The test was set forth most clearly in the recent case of *Franks v. State of Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains

> sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue." *Id.* at 2684-85.

The appellant in the instant case was on a fishing expedition. He made no offer of proof, or indeed no allegation that would support his demand.

(c) Appellant argues that his objections to the testimony of Detective Dykes concerning a controlled buy on October 15, 1980, should have been sustained or his motion to disclose the identity of the informants should have been granted at that time because the evidence was being used to prove his guilt. He contends that under *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) and *McCoy v. State*, 216 Md. 332, 337, 140 A.2d 689 (1958) disclosures must be made if informers' activities are offered to prove guilt. If this were error, it was harmless. Detective Dykes' testimony could add very little to the evidence of massive controlled dangerous substances in open view at the time of the raid. It could add even less to convince thejury that syringes and needles seized in the raid are controlled paraphernalia. We declare beyond a reasonable doubt the alleged improper evidence did not contribute to these verdicts. *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976).

IV. Motion for Mistrial

Appellant made a motion for a mistrial because a police officer testified as follows:

> "Q. You waited until the 18th and executed it [search warrant] at 3:50 in the afternoon.
>
> A. That is correct.
>
> Q. A time when you knew Maurice Jones was in that house?
>
> A. That is correct. We had information he was not in the house on the 17th, he had gone to get a load to bring in, and wasn't dealing.
>
> Mr. Walsh: Objection.
>
> The Court: Yes, Sir. Don't volunteer any information sergeant.
>
> Ladies and gentlemen of the jury, that last remark you will ignore and not take into consideration. It is not evidence in this case.
>
> Mr. Walsh: Can we approach the Bench?
>
> The Court: Yes, sir.
>
> (The following conference occurred at the Bench).
>
> Mr. Walsh: Again we would make a otion for a mistrial. That is twice now that that has happened."

We need not consider the question because the only convictions are for simple possession at the time of the raid of cocaine, marihuana and controlled paraphernalia; whether or not the appellant was "dealing" can have no substantial bearing on his guilt or innocence of those charges.

JUDGMENTS AFFIRMED.
APPELLANT TO PAY THE COSTS.

APPENDIX B

IN THE

Court of Appeals of Maryland

MAURICE JONES

Petition Docket No. 334
September Term, 1981

v.

(No. 788, September Term, 1980 Court of Special Appeals)

STATE OF MARYLAND ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: September 9th, 1981.

APPENDIX C

UNREPORTED

IN THE

Court of Special Appeals of Maryland

September Term, 1980

No. 441

ROBERT ADAM NEVERDON

v.

STATE OF MARYLAND

Morton
Melvin
Mason,

JJ.

PER CURIAM

Filed: November 28, 1980

Tried in a non-jury trial (Pollitt, J., presiding) on an uncontested statement of facts, the appellant, Robert Adam Neverdon, was convicted of possessing cocaine with intent to distribute for which he received a sentence of five years. He also was convicted of illegally possessing a pistol or revolver for which he was sentenced to a consecutive term of two years.

In this appeal appellant first contends that the trial court erred in refusing to grant his motion to suppress after the evidence demonstrated that the warrant to search appellant's person, premises and vehicle had been issued "before the application for the warrant had been supplied to the issuing judge."

The record before us and the record before the judge who conducted the suppression hearing (Truitt, J.) indicate that the search warrant, which was signed by Judge Richard M. Pollitt, was issued under date of October 16, 1979, and that the affidavit in support of the warrant was sworn to before Judge Pollitt on October 17, 1979. The State concedes this factual posture of the case.

The appellant argues, and properly so, that under the fourth amendment to the United States Constitution "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation"; and that under Article 26 of the Constitution of Maryland "all warrants, without oath or affirmation . . . are illegal, and ought not to be granted." Thus, it is crystal clear that no search warrant may be issued except upon the basis of a sworn affidavit submitted to the judge prior to his issuance of the warrant. Here it is uncontroverted that the search warrant on its face demonstrates that the date of issuance was one day before the supporting affidavit was submitted to the issuing judge.

The judge who heard the appellant's motion to suppress, after hearing arguments from both counsel for the appellant and the State, announced:

> "Now, gentlemen, to cross the first bridge first, the question has been raised as to the dates on the application and the search warrant itself, the search warrant having been dated the 17th of October, 1979, and the application having been dated the 16th of October, 1979 (sic).
>
> The Court feels that on the basis of Bell versus State, 200 Md., wherein it said that the lack of a date does not invalidate a search warrant, then we think it would follow that an obvious clerical mistake made in the entry of the dates is not fatal and is a matter of form."

In *Bell v. State*, 200 Md. 223, 224-25 (1952), it was said:

> "The search warrant was dated 'this _____ day of June', 1951. It recites watchings of the premises on June 16, 1951 and June 18, 1951. The affidavit was dated June 22, 1951. The search was made on June 22, 1951. Art. 27, sec. 306 of the Code, as amended by Chapter 81 of the Acts of 1950, provides that any search or seizure, under the warrant, 'shall be made within fifteen (15) calendar days from the date of issuance thereof and after the expiration of said fifteen (15) day period said warrant shall be null and void.' On its face the warrant shows that the 'date of issuance' must have been not earlier than June 18, 1951 or later than June 22, 1951, and that the Act of 1950 had been complied with. . . . We are satisfied that omission to date the warrant was an immaterial clerical error, which violated no requirement of the constitution or the act and did not invalidate the warrant. If the legislature had intended that 'an undated search warrant shall be null and void', it would have been easy to say so—in 1939 or in 1950. Such a provision would have given a loophole

> for the guilty and no real protection for either the innocent or the guilty. What is said in *Wilson v. State*, 200 Md. 187, 88 A.2d 564, this day decided, regarding the new objections to search warrants, is applicable to the instant case."

The problem on the record before us is not a question of an undated warrant but a warrant which on its face clearly says it was issued a day before the submission of the supporting affidavit. Judge Truitt was probably correct in his assessment that the date on the warrant and the date on the affidavit were a result of a "clerical mistake." On the other hand, we find nothing in the record to support his conclusion that it was "an obvious clerical mistake." The issue is much too crucial to the fair trial rights of the appellant to bottom such a conclusion on speculation, conjecture and probability.

Accordingly, we are compelled to reverse the judgments of conviction and do not reach the remaining issues raised by appellant.

JUDGMENTS REVERSED;

CASE REMAINED FOR A NEW TRIAL;

COSTS ARE NOT REALLOCATED AS PART OF THE JUDGMENTS OF THIS COURT PURSUANT TO MARYLAND RULE 1082f.